

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether appellant has met his burden of proof to establish an injury in the performance of duty, as alleged.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On June 28, 2019 appellant, then a 65-year-old retired assistant port director, filed an occupational disease claim (Form CA-2) alleging that he developed non-smokers emphysema due to factors of his federal employment. He noted that he first became aware of his condition and first realized its relationship to his federal employment on March 27, 2019. On the reverse side of the claim form D.C., an assistant port director for the employing establishment, noted that appellant retired, effective August 31, 2018.

In a development letter dated July 19, 2019, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of medical and factual evidence necessary to establish his claim and provided a questionnaire for his completion. In a separate development letter of even date, OWCP also requested additional information from the employing establishment. It afforded both parties 30 days to submit the necessary information.

In a memorandum dated August 8, 2019, D.C. responded on behalf of the employing establishment reporting that appellant's position at the employing establishment was primarily a supervisory and administrative position that did not require constant exposure to the elements. He noted that the port area was surrounded by open desert with the associated dust and wind. D.C. provided a position description for an assistant port director.

By decision dated August 28, 2019, OWCP denied appellant's occupational disease claim, finding that the evidence of record failed to establish the alleged factors of his employment. It specifically noted that he failed to respond to OWCP's request for a detailed statement regarding how his federal employment caused or contributed to his claimed condition. OWCP, therefore, concluded that the requirements had not been met to establish an injury as defined by FECA.

On September 25, 2019 appellant requested reconsideration. By decision dated October 29, 2019, OWCP denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

On April 8, 2020 appellant, through counsel, requested reconsideration.

In reports dated June 7, 2019 through February 3, 2020, Dr. Juan Fernandez, a Board-certified pulmonologist, diagnosed interstitial lung disease, post-influenza syndrome, and history of deep vein thrombosis and pseudo aneurysm. In a July 24, 2019 report, he indicated that a

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<sup>3</sup> Docket No. 20-1477 (issued March 25, 2021).

computerized tomography (CT) scan of appellant's chest<sup>4</sup> showed panlobular emphysema. Dr. Fernandez opined that etiology was "most likely to be related to his previous job/work environment" since he did not have a history of smoking.

By decision dated June 30, 2020, OWCP denied modification of the August 28, 2019 decision.

Appellant timely appealed to the Board. By decision dated March 25, 2021, the Board affirmed the June 30, 2020 decision, finding that appellant had not met his burden of proof to establish an injury in the performance of duty, as alleged.<sup>5</sup>

On May 14, 2021 appellant, through counsel, requested reconsideration.<sup>6</sup>

Appellant submitted a completed OWCP's development questionnaire dated May 5, 2021. He indicated that he believed he developed emphysema while working as a customs inspector from 1988 to 2018. Appellant explained that his primary duty was inspecting vehicles coming inbound from Mexico. He reported that he worked an average of 64 hours per day and inspected an average of 2,080 vehicles per week. Appellant asserted that he was exposed to and had contact with car exhaust fumes from vehicular traffic, air pollution, and weather elements, such as dust. He indicated that outside of his federal employment, he had limited exposure to vehicle exhaust fumes and dust. Appellant explained that he first noticed his condition changing in early 2015 when his stamina and endurance declined and he developed a persistent cough. He noted that, at that time, doctors attributed his symptoms to the cold and flu. Appellant reported that he was finally diagnosed in 2019 when he suffered respiratory distress and had to go to the hospital.

In an August 10, 2021 decision, OWCP denied modification of the June 30, 2020 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>7</sup> has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time

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<sup>4</sup> A January 8, 2020 chest CT scan showed parenchymal distortion with mild subpleural reticulation suggestive of an interstitial lung disease, stable 5.0 mm partly calcified nodule in the right upper lobe, moderate generalized centrilobular emphysema in the upper lobe, and persistent small loculated right pleural effusion. A plethysmography report of even date revealed moderate restrictive lung defect, increased airway resistance, and a decrease in diffusing capacity.

<sup>5</sup> *Supra* note 3.

<sup>6</sup> Although appellant claimed to be filing a request for reconsideration from the Board's March 25, 2021 decision, OWCP is not authorized to review Board decisions. The decisions and orders of the Board are final as to the subject matter appealed and such decisions and orders are not subject to review, except by the Board. *See* 20 C.F.R. § 501.6(d). Although the March 25, 2021 Board decision was the last merit decision, the June 30, 2021 OWCP decision is the appropriate subject of possible modification by OWCP.

<sup>7</sup> *Id.*

limitation of FECA,<sup>8</sup> that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.<sup>9</sup> These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>10</sup>

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.<sup>11</sup>

### ANALYSIS

The Board finds that this case is not in posture for decision.

Appellant has alleged that he developed emphysema due to factors of his federal employment. OWCP initially denied his claim finding that he had failed to establish that the employment factors occurred as alleged. It specifically noted that appellant failed to respond to OWCP's request for a detailed statement regarding how his federal employment caused or contributed to his claimed condition. By decision dated March 25, 2021, the Board affirmed the denial of his claim.

Following the Board's March 15, 2021 decision, appellant submitted his response to OWCP's July 19, 2019 development questionnaire. He asserted that he developed emphysema while working as a customs inspector for the employing establishment from 1988 to 2018. Appellant explained that, as a customs inspector, he worked an average of 64 hours per day and inspected an average of 2,080 vehicles per week arriving inbound from Mexico. He indicated that he was exposed to car exhaust fumes from vehicular traffic, air pollution, and weather elements.

OWCP's procedures provide that a description of job duties will almost always be required to adjudicate an occupational disease claim.<sup>12</sup> It further notes that a claimant should usually be asked to describe the physical and environmental requirements of the job, and the supervisor or injury compensation specialist should review that statement and provide comments if there is any

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<sup>8</sup> *D.D.*, Docket No. 19-1715 (issued December 3, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>9</sup> *Y.G.*, Docket No. 20-0688 (issued November 13, 2020); *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>10</sup> *C.H.*, Docket No. 19-1781 (issued November 13, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

<sup>11</sup> *T.M.*, Docket No. 20-0712 (issued November 10, 2020); *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *R.H.*, 59 ECAB 382 (2008).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.7b(2). (June 2011)

disagreement.<sup>13</sup> While the employing establishment responded to OWCP's July 19, 2019 development letter, the Board notes that it provided information regarding appellant's employment duties as an assistant port director and provided a position description for an assistant port director. Appellant, however, has not attributed his pulmonary condition to his employment duties as an assistant port director, but to his employment as a customs inspector from 1988 to 2018. The Board notes that OWCP did not request further information, including his position description as a customs inspector from 1988 to 2018, from the employing establishment addressing appellant's contentions that he was exposed to vehicle fumes and/or environmental conditions. For this reason, the Board finds that the case must be remanded for further development of the factual evidence.<sup>14</sup>

It is well established that, proceedings under FECA are not adversarial in nature and while the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment.<sup>15</sup> OWCP has an obligation to see that justice is done.<sup>16</sup>

On remand OWCP should obtain a detailed statement from the employing establishment indicating whether it concurred with appellant's allegations and a position description for a customs inspector. If the employing establishment fails to respond to a request for comments on appellant's allegations, OWCP's claims examiner may accept the statements as factual.<sup>17</sup> Following this and any such further development as deemed necessary, OWCP shall issue a *de novo* decision.

### **CONCLUSION**

The Board finds that this case is not in posture for decision.

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<sup>13</sup> *Id.*

<sup>14</sup> *See D.C.*, Docket No. 21-0231 (issued August 27, 2021) (case was remanded because the employing establishment did not provide a detailed statement indicating whether it concurred with appellant's allegations); *see also M.T.*, Docket No. 18-1104 (issued October 9, 2019) (case was remanded for OWCP to obtain a statement from the employing establishment addressing appellant's allegations regarding harassment at work).

<sup>15</sup> *D.O.*, Docket No. 20-0006 (issued September 9, 2020); *R.A.*, Docket No. 17-1030 (issued April 16, 2018); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985).

<sup>16</sup> *S.S.*, Docket No. 18-0397 (issued January 15, 2019); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

<sup>17</sup> Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 2.800.5d(1) (June 2011). *See also L.B.*, Docket No. 17-1671 (issued November 6, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 10, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 22, 2022  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board